Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)	 WC Docket No. 03-266

COMMENTS OF THE VERIZON TELEPHONE COMPANIES

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March 1, 2004

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I. INTRODUCTION AND SUMMARY

As Verizon has consistently made clear,[2] it strongly supports the view that VoIP should be regulated with a "light touch" and that the Commission should not apply traditional phone regulation to true VoIP services. There is no need for the Commission reflexively to apply the entire range of common carrier regulation to this new and emerging technology. Instead, the Commission should let VoIP products and services develop in a competitive atmosphere where all providers are free from burdensome economic regulation.

As a result, Verizon also supports the view that VoIP services, including the voice communications services described in the forbearance petition, are interstate services subject to this Commission's exclusive jurisdiction. This Commission has consistently concluded that where it is not possible or practicable to discern the geographic location of either the calling or

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[1] The Verizon telephone companies ("Verizon") are the local exchange carriers affiliated with Verizon Communications Inc., listed in the Attachment to these Comments.

[2] *See, e.g.,* Ex Parte Letter from Kathleen Grillo, Verizon, to Marlene H. Dortch, FCC, WC Docket Nos. 02-361, 03-266, 03-211 & 03-45 (Jan. 22, 2004) ("Verizon White Paper").

the called party, it will not attempt to separate the service into interstate and intrastate components. Thus, Verizon has urged the Commission to declare that these services, which consist of voice communications between Internet Protocol ("IP") and public switched telephone network ("PSTN") facilities, are interstate services. A finding that VoIP services are jurisdictionally interstate will spur the deployment of VoIP by preventing the development of a patchwork of inconsistent and potentially burdensome state regulations.

But whether VoIP calls should be subject to economic regulation is an entirely separate question from whether local exchange carriers ("LECs") like Verizon should be compensated for the use of the public switched telephone network.[3] Under the Commission's existing precedents, access rates clearly apply. This is so for two reasons:

First, Level 3's standard voice telephone services, including those that use Internet Protocol, are not information services. Instead, they are standard voice telephone calls between a customer of Level 3 and a customer of a different local exchange carrier, without a change in the form or content of the call. While Level 3 may also provide other services or features to their end users, that does not affect the nature of the communication here.

Second, in any event, Level 3's voice communications do not fall within the scope of the ISP exemption. The Commission's ISP exemption is narrow and applies only to communications between the ISP and the end user, such as where the end user is accessing stored information in the ISP's database. In these circumstances, the Commission concluded that

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[3] The sweeping relief sought by Level 3 extends beyond Level 3 and would also apply to "all other carriers handling Voice-embedded IP communications that originate or terminate on the PSTN." *Petition* at 1. Level 3 also seeks forbearance with respect to certain "PSTN-PSTN" VoIP traffic that is incidental to its VoIP traffic. *Id* at 1, 7. The potential scope of this "incidental VoIP traffic" is extremely broad and could end up allowing Level 3 to avoid even more access charges than would its request with respect to IP-PSTN traffic.

the ISP used the network in a way that is similar to the way other business end users use the network to communicate with their customers – for example, a pizza parlor's customers calling to order pizza. And it was the difference between that usage and the usage that long distance carriers make of the network that allowed the Commission to give ISPs different treatment from other carriers without violating the statutory prohibition against unreasonably discriminating between similarly situated entities. Here, Level 3 is a conduit for a communication between one of its end users and the end user of a local exchange carrier that is served by the public switched telephone network, and Level 3 is using the public switched telephone network in the same way as other long distance carriers. The ISP exemption does not apply, and it would be facially unlawful to treat this traffic differently from traffic carried by another long distance carrier.

In sum, Level 3 and other VoIP providers should have to compensate Verizon and the other local exchange carriers for the use of the network. Likewise, Level 3's VoIP traffic should be subject to CALEA and universal service obligations to the same extent as other providers.

In addition, Level 3's petition does not satisfy the statutory test for when forbearance is appropriate. The payment of access charges, which this Commission has already approved as "just and reasonable,"[4] is necessary fairly to compensate Verizon and the other LECs for their costs and to ensure that some carriers are not unreasonably discriminated against in favor of other carriers. The payment of access charges also is necessary to protect consumers, for otherwise, LEC customers would be forced to subsidize the rates that Level 3's customers pay to make interstate telephone calls. And forbearance from paying access charges is not consistent with the public interest, because requiring VoIP providers that use the PSTN to pay access

[4] *See* Sixth Report and Order, *Access Charge Reform*, CC Docket No. 96-262, 15 FCC Rcd 12962, ¶ 41 (2000) ("*CALLS Order*") (emphasis added).

charges will put them on a more equal footing with other long distance carriers and will help to ensure that competition is not artificially skewed in favor of any one technology.

Finally, Level 3's petition seeks to engage in regulatory arbitrage that would both deprive the terminating LEC of access charges *and* secure a windfall for itself under the Commission's reciprocal compensation mechanism adopted in the 2001 *ISP Remand Order*.[5] By counting terminating interexchange minutes as "originating" local minutes when calculating the 3:1 ratio, Level 3 would not only fail to compensate LECs for terminating Level 3's interstate calls, but LECs like Verizon would end up paying Level 3. Such regulatory arbitrage is never in the public interest.

II. DISCUSSION

A. Level 3's VoIP Services Are Jurisdictionally Interstate

Level 3's VoIP service is an interstate service subject to this Commission's jurisdiction. Its service begins when a customer – who can be located anywhere in the world – places a call in IP format using an IP telephone. The IP call is routed over IP transmission networks to the Level 3 gateway located closest to the called PSTN number. The Level 3 gateway converts the call from an IP format to a circuit-switched call and routes it to the point of interconnection with the LEC serving the called party, and the LEC completes the call.

Because the IP telephone number is associated with a particular customer but not with a particular geographic location, the party at the IP end of a Level 3 call potentially could be

[5] Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1927 (2003).

located anywhere there is a broadband connection.[6] In providing its VoIP service, Level 3 associates the customer's IP telephone number with the customer's specific IP address. The Commission has concluded that, where there is no simple way to determine the location of the IP caller, the service is interstate.[7] In the *Cable Modem Declaratory Ruling*, the Commission classified cable modem service as interstate, recognizing that "an examination of the location of the points among which cable modem service communications travel" reveals that the points "are often in different states and countries."[8] The Commission also has classified DSL service used to provide Internet access as interstate for the same reason.[9] And it has long treated special access or private lines as interstate so long as interstate traffic constitutes more than 10 percent of the total traffic on the line.[10]

The Commission recently declared that pulver.com's service was interstate because of "the global portability feature of [pulver.com's] member's unique identification number, enabling that member to initiate and receive on-line communications from anywhere in the world

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[6] *See Petition* at 18 ("[U]nlike circuit-switched telephone numbers used in conjunction with the PSTN, which bear a relationship to the location of the telephone, telephone numbers used in conjunction with Voice-embedded IP communications are divorced from geography.").

[7] *See* Memorandum Opinion and Order, *Petition for Declaratory Ruling that pulver.com's Free World Dial Up Is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, FCC 04-27, ¶ 22 (FCC rel. Feb. 19, 2004) ("*Pulver Order*") (where "it is impossible or impractical to attempt to separate [the service] into interstate and intrastate components," the Commission will declare that the service is interstate).

[8] *See* Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶ 59 (2002), *vacated in part on other grounds*, *Brand X Internet Servs v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

[9] *See* Memorandum Opinion and Order, *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, 22466, ¶ 1 (1998) (concluding that DSL service, "which permits Internet Service Providers (ISPs) to provide their end user customers with high-speed access to the Internet, is an interstate service and is properly tariffed at the federal level").

[10] *See* 47 C.F.R. § 36.154(a).

where it can access the Internet via a broadband connection."[11] The same analysis applies here. It makes no difference whether Level 3's service is classified as an information service; the critical question is whether the service is substantially interstate and whether the interstate component is somehow severable from the intrastate component. It is true that pulver.com's VoIP service both originates *and* terminates on the Internet, while Level 3's service can either originate or terminate on the PSTN. But that is not an important difference in this context; while one end of a Level 3 call may well be geographically fixed, the other end (just like both ends in pulver.com's service) could literally be anywhere in the world.[12] The Commission's rationale from the *Pulver Order* applies equally to confirm that Level 3's service is also jurisdictionally interstate in nature.

B. Voice Calls That Use the PSTN Are Subject to Access Charges Under Existing Rules

To the extent that Level 3's VoIP services use the PSTN (and only to that extent), they are subject to access charges under the Commission's existing rules. Moreover, even if Level 3's service were considered an "information service," it would not be covered by the ISP exemption.

1. Level 3's Voice Calls Are Subject to Access Charges Because They Use the PSTN

The voice telephone calls that Level 3 exchanges with local telephone companies are subject to access charges when they use the public switched network. Level 3 is providing a service that allows its customers to engage in a real-time voice conversation during a phone-to-

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[11] *Pulver Order* ¶ 22.

[12] *See id.* ¶ 20 ("Unless an information service can be characterized as 'purely intrastate,' or it is practically and economically possible to separate interstate and intrastate components of a jurisdictionally mixed information service without negating federal objectives for the interstate component, exclusive Commission jurisdiction has prevailed.") (footnote omitted).

phone call with customers of other carriers located on the PSTN, and such a service is undeniably a service to which access charges and universal-service payments apply. Although Level 3 apparently also offers other services that would qualify as "information services," allowing their own customers to access stored data and to otherwise process, utilize, and retrieve it,[13] that fact does not transform everything Level 3 does into an "information service."

Aside from the inability to determine the geographic location of the customer at the IP end of the call from the IP telephone number, the service that Level 3 provides bears almost no resemblance to the FWD service offered by pulver.com that the Commission recently classified as an information service. As an initial matter, neither end of the telephone call facilitated by pulver.com's FWD service is on the PSTN; indeed, unlike Level 3's VoIP traffic, an FWD call never touches the PSTN. Moreover, as the Commission explained, "[u]nder the statute, the heart of 'telecommunications' is transmission."[14] Level 3, by its own admission, provides its customers with transmission to complete its VoIP calls.[15] The Commission concluded that pulver.com does not offer or provide the customer any transmission services.[16] Thus, the Commission's classification of pulver.com's FWD service as an information service does not change the fact that Level 3's VoIP service is not.

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[13] *See Petition* at 11-14; *see also* Declaration of Jeffrey Pelletier at 5-8, attached to *Petition*.

[14] *See Pulver Order* ¶ 9.

[15] *See, e.g., Petition* at 17 ("Level 3 carries the communication over its common carrier transmission facilities to the Level 3 point of presence on the LATA.").

[16] *Pulver Order* ¶ 9.

2. Level 3's Service Does Not Fall Within the Scope of the ISP Exemption In Any Event, and Access Charges Still Apply Regardless of the Classification of the Services at Issue Here

Even if the Commission were to conclude that Level 3's service is appropriately classified as an "information service," access charges would still apply.[17] Providers of information services that use exchange access services are obligated to pay access charges unless otherwise exempt. Over 20 years ago, the Commission recognized that ISPs were "[a]mong the variety of users of access service[s]," a group that included "facilities-based carriers, resellers (who use facilities provided by others), sharers, privately owned systems, enhanced service providers, and other private line and WATS customers, large and small."[18] When it created the access-charge regime, the Commission's "intent was to apply these carrier's carrier charges to interexchange carriers, and to all resellers *and enhanced service providers* . . . ."[19]

Having made access charges applicable to ISPs, however, the Commission then decided to adopt a narrow exemption. As the Commission subsequently explained, "ISPs should not be subjected to an interstate regulatory system designed for circuit-switched interexchange voice telephone *solely because ISPs use incumbent LEC networks to receive calls from their*

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[17] While access charges apply even if Level 3's service is considered an "information service," the issues with respect to the Communications Assistance for Law Enforcement Act, 47 U.S.C. §§ 1001-1010 ("CALEA") are more complicated. If CALEA is to fulfill its function of ensuring that law enforcement officials have the technical means to intercept wire and electronic communications and to access call-identifying information, then it must apply to *all* providers of such services, including cable companies and others – such as Level 3 – that offer broadband transmissions of voice communications. Otherwise, criminals will be able to avoid surveillance by simply using voice over Internet protocol to communicate rather than the traditional telephone network.

[18] Memorandum Opinion and Order, *MTS and WATS Market Structure*, 97 F.C.C.2d 682, ¶ 78 (1983) ("*MTS/WATS Market Structure Order*").

[19] *Id.* ¶ 76 (emphasis added).

customers."[20] When deciding to continue the exemption notwithstanding "the evolution in ISP technologies and markets since [the Commission] first established access charges in the early 1980s," the Commission recognized that the central justification for treating ISPs differently was because "it is not clear that ISPs use the public switched network in a manner analogous to IXCs. . . . [M]any of the characteristics of ISP traffic (such as large numbers of incoming calls to Internet service providers) may be shared by other classes of business customers."[21]

The Commission elaborated on its justification for retaining the exemption in its brief to the Court of Appeals: "Although the LEC services or facilities used by the ISPs may be similar to those used by some companies that pay per-minute access charges, *the ISPs do not use them in the same way or for the same purposes*. . . . [T]he ISP's use of the LEC facilities is analogous to the way another business subscriber uses a similarly-priced local business line to receive calls from customers who want to buy that subscriber's wares that are stored in another state and require shipment back to the customer's location."[22] The Commission has recognized that the ISP exemption "in effect treats ISPs as 'end users' of local services and does not require them to pay per-minute access charges."[23]

In upholding the ISP exemption from paying access charges, the Eighth Circuit agreed with the Commission, concluding that ISPs "do not utilize LEC services and facilities in the

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[20] First Report and Order, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, 12 FCC Rcd 15982, ¶ 343 (1997) ("*Access Charge Reform Order*"), *petitions for review denied*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) (emphasis added).

[21] *Id.* ¶ 345.

[22] Brief for the FCC at 75-76, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1997) (No. 97-2618) ("FCC Br.") (emphasis added).

[23] *Id.* at 81.

same way or for the same purposes as other customers who are assessed per-minute interstate access charges. . . . [E]ven where two different sets of carriers seek to use LEC network services and facilities that might be 'technologically identical,' the services and facilities provided by the LEC are 'distinct' *if the carriers are making different uses of them*."[24]

Like a pizza parlor that purchases business lines to receive calls from its customers who want to order pizza, the typical ISP purchases business lines in order to receive calls from its customers who want to obtain access to the Internet or to some information service stored in a database. This is the sort of traffic that the Commission and the courts have recognized as exempt from access charges, and VoIP traffic is nothing like it. In a typical information service, the ISP does not use the PSTN on both ends of the call to originate or terminate voice communications. The ISP exemption applies only to exempt from access charges the situation in which an ISP allows its subscribers to obtain access to the ISP's own information services. The exemption was never conceived to apply when a non-ISP subscriber uses an ordinary telephone to make a call to a Level 3 subscriber, where the calling party's service provider hands the call off to Level 3 which then converts the call to IP format and terminates it at an IP phone. The exemption was also never intended to apply when a Level 3 subscriber makes a call from an IP phone, which Level 3 converts and then hands off to the called party's provider to terminate on the PSTN. Where the ISP uses the PSTN to allow a non-customer either to make or to receive an ordinary telephone call, it is using the PSTN not "in order to receive local calls from customers who want to buy [its] information services" but, rather, "in a manner analogous to IXCs."[25]

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[24] *Southwestern Bell*, 153 F.3d at 542 (emphasis added); *see also id.* 544 ("Here, the FCC is exempting from interstate access charges ISPs that, according to the FCC, utilize the local networks differently than do IXCs.").

[25] FCC Br. at 75-76; *Access Charge Reform Order* ¶ 345.

In sum, even if the Commission were to conclude that Level 3's service is an information service, Level 3 is subject to the same access charges applicable to any carrier that uses the PSTN in similar ways.

C. Level 3's *Petition* Fails To Satisfy the Three Requirements for Regulatory Forbearance

Level 3 is seeking forbearance from enforcement of section 251(g) insofar as it applies to the receipt of compensation for switched "exchange access, information access, and exchange services for such access to interexchange carriers and information service providers," pursuant to state and federal access charge regulations. *See* 47 U.S.C. § 251(g). Moreover, Level 3 seeks forbearance from enforcement of the Commission's access charge regulation, 47 C.F.R. § 69.5(b). While the Commission should not apply traditional economic regulation to VoIP services, Level 3's petition should be denied because it has failed to prove that it satisfies any of the elements required for forbearance – much less all three – and has, therefore, failed to demonstrate that it is entitled to forbearance from the requirement to pay these charges.

1. Forbearance is Not Appropriate Because Level 3 Seeks to Replace a Just and Reasonable Rate with One that Does Not Cover ILEC Costs and Will Result in Unreasonable Discrimination

Access charges are intended to allow LECs "[t]o recover the costs of providing interstate access services."[26] A LEC's facilities are used to provide both local and interexchange services. While LECs recover the costs of providing local service through basic intrastate telephone rates, access charges compensate LECs for the costs incurred when they originate or terminate interexchange telecommunications traffic.[27] Thus, access charges are essential to allow LECs to recover the full costs of their networks. Indeed, Chairman Powell has "fully recognize[d] the

[26] *CALLS Order* ¶ 130.

[27] *Id.* ¶ 5.

gravity of any decision that might cause a precipitous decline in access charge revenues and a concomitant impact on universal service."[28] Despite this, Level 3 claims that it and other VoIP providers need not pay access charges when they use the PSTN for interstate calls because LECs will still receive adequate compensation for the termination of local traffic.

Level 3 is wrong. *First*, the proper level of access charges has already been set by the Commission in the *CALLS Order*, and the Commission has already determined that access charges are "just and reasonable." Thus, forbearance from applying these charges is inappropriate. In the *CALLS* proceeding, the Commission followed its "long-standing policy to require, to the extent possible, rate structures to reflect the manner in which carriers incur cost,"[29] and it found that the CALLS proposal "reduces, and in most instances eliminates, implicit subsidies among end-user classes; makes implicit universal service funding in access charges explicit and portable; [and] provides significant benefits to consumers who make few or no long distance calls."[30]

Level 3 does not contest that current access rates are just and reasonable but simply asserts that the impact of lost access charge revenues will be insubstantial. Specifically, Level 3 contends that by 2006, VoIP communications will constitute only 4% of circuit-switched national and international long distance revenues. But analysts expect VoIP penetration to be far higher, believing that cable will control "as much as 7% of current RBOC residential lines" by

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[28] Written Statement of Michael K. Powell, Chairman, Federal Communications Commission on Voice over Internet Protocol (VoIP), Before the Committee on Commerce, Science and Transportation, at 15 (Feb. 24, 2004) ("Powell Statement").

[29] *CALLS Order* ¶ 129.

[30] *Id.* ¶ 29; *see also id.* ¶ 36 ("The CALLS Proposal is a reasonable approach for moving toward the Commission's goals of using competition to bring about cost-based rates, and removing implicit subsidies without jeopardizing universal service.").

the end of next year,[31] and more than 15 percent of all primary residential lines within the next 4 years.[32] Cable IP telephony is now viewed as "the largest risk to Bell fundamentals over the next 5 years."[33] Experience has also shown that in markets where cable providers are offering telephony service, they are achieving significant penetration – typically as much as 30-35 percent in mature markets, and in some markets as much as 45-55 percent.[34] In any case, even if Level 3's 4% prediction were accurate, it would still reflect well over a hundred million dollars in lost revenues to the industry as a whole.

If Level 3's *Petition* were granted, the amount of access charges lost by LECs would only increase as more long-distance traffic migrated to IP telephony because of the lower prices of access services applied to VoIP traffic. Level 3's argument does not account for the increased reciprocal compensation payments by LECs to CLECs such as Level 3 under the Commission's *ISP Remand Order* if Level 3's VoIP traffic were classified as local originating traffic. Thus,

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[31] Frank Governali, *et al.*, Goldman Sachs, Telecom Services: Qualifying the VoIP Threat, an Eye-Opening Exercise at 1 (Dec. 23, 2003) ("Goldman Sachs VoIP Report").

[32] Bernstein Research Call, *U.S. Telecom & Cable: Faster Roll-Out of Cable Telephony Means More Risk to RBOCS; Faster Growth for Cable* at 1 ("[W]e are raising our estimate of cable telephony subscribers from 10.4M by 2008 (off a 2003 base of 2.3 M) to 17.4 M. Our new outlook suggests that the cable MSOs will control 15.5% of the consumer primary access lines in the US by 2008, up from our previous estimate of 9.3%") ("*Bernstein Cable Telephony Report*"); *Goldman Sachs VoIP Report* at 1 ("We've been expecting the Bells to lose 20% to 30% consumer market voice share, as a result of the aggressive introduction of voice services by the cable industry over the next 5 to 7 years.").

[33] John Hodulik, UBS Investment Research, *Cable Telephony Competition: Who Gets It?* at 1 (Aug. 7, 2003).

[34] Matt Richtel, *Time Warner Deal Raises Ante in cable's Bid for Phone Market*, N.Y. Times (Dec. 9, 2003) ("In Omaha, 45 percent of Cox's cable customers now subscribe to its telephone service, and in Orange County, Calif., that figure is 55 percent."); Bernstein Research Call, *Cable and Telecom: Bernstein Study Finds Consumers Ready and Willing To Switch to Cable Telephony* (Dec. 9, 2003) (in Cox's most mature circuit switched markets share is now approaching 35% of homes passed); *Bernstein Cable Telephony Report* at 2-3 ("Of the providers already offering telephony service – either over a circuit switched network or IP-based – the penetration rates have been impressive and above forecast.").

contrary to Level 3's argument, the amount of revenues lost (and the increased expense) by LECs would likely be substantial.

Second, as Verizon has discussed elsewhere,[35] the TELRIC reciprocal compensation rates that Level 3 seeks to pay instead of the approved interstate access rates do not adequately compensate Verizon for the costs of terminating access traffic. Because TELRIC assumes a hypothetical, ideally efficient network, it produces rates that are lower than any real-world carrier can match and thus does not provide "just and reasonable" compensation for the real costs incurred by Verizon for providing access services. As a result, it discriminates against incumbents by requiring them to bear their actual costs while allowing competitors to pay lower rates.

Finally, granting Level 3's *Petition* would subject existing IXCs to unjust and unreasonable discrimination. "[O]ne of the Commission's primary goals when designing an access charge regime was to ensure that access users were treated in a nondiscriminatory manner when interconnecting with LEC networks in order to transport interstate communications."[36] If Level 3's argument were accepted, however, circuit-switched IXCs would be required to pay access charges when their interstate traffic uses the LEC's PSTN, while interstate traffic carried by Level 3 would not be subject to such payments even though such traffic reaches the LEC's PSTN in the same way. Requiring Level 3 to pay access charges when its interstate traffic uses the PSTN is necessary to ensure that rates are not unjustly or unreasonably discriminatory.

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[35] *See* Petition for Forbearance From the Current Pricing Rules for the Unbundled Network Element Platform at 2-5, 16, 19, *Petition for Expedited Forbearance of the Verizon Telephone Companies*, WC Docket No. 03-157 (filed July 1, 2003); Reply Comments of Verizon Telephone Companies at 3-4, 38 (filed Sept. 2, 2003).

[36] *ISP Remand Order* ¶ 36 n.63 (citing *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1101-1108, 1130-34 (D.C. Cir. 1984)).

2. Application of the Access Rule Is Necessary to Protect Consumers

As Verizon has already explained, access charges are necessary to allow LECs to operate and maintain their networks. Level 3 acknowledges that if the Commission excuses it from paying access charges, those costs will be transferred both to interexchange carriers that do pay access charges and to LEC customers. But price caps limit the LECs' ability to recover those lost revenues from other customers. And to the extent Verizon were able to raise its rates to recover those lost revenues, granting Level 3's forbearance request would amount to an implicit subsidy of Level 3's services in violation of 47 U.S.C. § 254.

The Commission has previously denied a forbearance petition where one class of consumers would otherwise be required to pay more and subsidize another class of consumers.[37] Level 3 argues that consumers are harmed only if local rates become so high as a result of allowing Level 3 to escape access charges that basic phone service becomes unaffordable.[38] But

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[37] In the *Oncor Order*, Oncor requested that the Commission forbear from its existing universal service contribution rules for carriers with declining revenues. Memorandum Opinion and Order, *Petition for Forbearance from Enforcement of Sections 54.709 and 54.711 of the Commission's Rules by Operator Communications, Inc. D/B/A Oncor Communications, Inc.*, 16 FCC Rcd 4382, ¶ 4 (2001) ("*Oncor Order*"). Oncor argued that because the Commission's rules require carriers to contribute to universal service based on prior year revenues, carriers with declining revenues pay a greater percentage of their current revenues to universal services. *Id.* The Commission rejected Oncor's request, concluding that "by exempting Oncor, or other similarly situated carriers with declining revenues, from having to comply with the current contribution rule, while continuing to require carriers with stable or increasing revenues to comply with the rule, would result in a discriminatory and inequitable mechanism." *Id.* ¶ 9. Specifically, "Oncor, and other carriers with declining revenues, would benefit from an unfair competitive advantage because they would not incur the expenses incurred by other carriers still required to contribute to the universal service fund." *Id.*

[38] *See Petition* at 49-50 ("The only way the grant of this petition could somehow adversely affect consumers would be if the exclusion of IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications applications from the access charge regime were to lead to such substantial increases in end user rates that those rates became unaffordable and subject to wide discrepancies between urban and rural areas, and the FCC and state commissions then

Level 3 cites no authority for this narrow and skewed view of consumer welfare. Forbearance is clearly inappropriate when the result would be that one class of consumers is forced to subsidize another class.

3. Forbearance Would Not Be in the Public Interest

Level 3 fails to demonstrate that exempting its VoIP traffic from access charges would be in the public interest. Far from "promot[ing] competitive market conditions" and "enhanc[ing] competition among providers of telecommunications services," granting Level 3's *Petition* would have the opposite effect. 47 U.S.C. § 160. Moreover, it would sanction regulatory arbitrage.

a. Competition Would Not Be Enhanced

Level 3 argues that forbearance would benefit competition by increasing innovation, resulting in greater efficiency and versatility for end users. As an initial matter, Level 3 provides no evidence supporting its argument that paying access charges for its interstate VoIP traffic would have a substantial impact on innovation in VoIP technology.[39] "[C]ompetitively neutral rules will ensure that . . . disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of potential service providers."[40] The

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refused to address such discrepancies through statutorily authorized universal service mechanisms.").

[39] *See* Memorandum Opinion and Order, *Petition for Forbearance From Further Increases in the Numbering Utilization Threshold*, 18 FCC Rcd 13,311, ¶ 16 (2003) (rejecting argument that denial of forbearance "will lead to increased carrier and consumer costs" where petitioner had "not presented any data or detailed cost-benefit analysis to support this assertion").

[40] *See* Report and Order, *Federal State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶¶ 48, 49 (1997) ("We anticipate that a policy of technological neutrality will foster the development of competition"); *see also Oncor Order* ¶ 9 (noting that "the Commission established the principle of competitive neutrality to ensure that the universal service support

Commission has previously explained that its "consideration of any request for forbearance, as a general matter, is technology-neutral and therefore does not turn on the asserted qualitative merits of a proponent's technology."[41]

Putting IP telephony providers on an equal footing with other interexchange carriers with respect to the payment of access charges will help to ensure that competition is not artificially skewed in favor of any one technology. Any other result would be "at odds with the technology neutral goals of the Act and with Congress' aim to encourage competition in all telecommunications markets."[42] In any event, as Chairman Powell recently observed, innovation in VoIP services is best promoted through a "light touch" regulatory approach,[43] not by allowing VoIP providers such as Level 3 to avoid paying the full cost of the services they use at the expense of LECs and other access customers. Such an approach will help ensure that "[VoIP] technology succeeds because of its inherent ability, not due to regulatory arbitrage or exception."[44]

Level 3 also argues that the requested forbearance would be in the public interest because it will reduce regulatory uncertainty. This argument is completely empty, because a decision by

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mechanisms and rules neither unfairly favor nor disfavor one provider or technology over another").

[41] *See* Report and Order, *Amendments to Parts 1,2,27 and 90 of Commission's Rules to License Services in 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-4135 MHz, 1670-1675 MHz and 2385-2390 MHz Government Transfer Bands*, 17 FCC Rcd 9980, ¶ 80 (2002).

[42] *See* Order on Remand, *Deployment of Wireline Services Offering*, 15 FCC Rcd 385, 390 ¶ 12 (1999).

[43] Powell Statement at 3.

[44] *See* Opening Remarks of Commissioner Michael J. Copps Voice Over Internet Protocol Forum December 1, 2003, 2003 WL 22833467 (FCC Dec. 1, 2003).

the Commission that access charges *do* apply to Level 3's VoIP traffic would equally reduce any uncertainty in this area.

Level 3 raises the related argument that it makes no sense to require access charges now, only to reverse course once the Commission establishes a uniform intercarrier compensation regime. *Petition* at 40-41. Level 3's argument is remarkable in that it asks the Commission to *reward* it for breaking the rules by relying upon the "burden" of requiring it to comply with the law. As discussed above, under the Commission's rules, Level 3 should have been paying access charges for its interstate VoIP telecommunications traffic all along; the fact that Level 3 may now be required to make internal changes to bring it into compliance with the law is the result of its own past decisions. Moreover, Level 3 provides no basis for its assumption that the Commission will ultimately rule that Level 3 is required only to pay local reciprocal compensation rates for access services, nor does it even describe a timetable for when the Commission will complete its reform of intercarrier compensation.

b. Granting the Petition Would Provide Level 3 and Others an Opportunity for Regulatory Arbitrage

Level 3 is asking this Commission to sanction regulatory arbitrage that would not only deprive the terminating LEC of the access charges to which it is entitled, but it would also provide the CLEC a windfall under the Commission's reciprocal compensation mechanism adopted in the 2001 *ISP Remand Order*.[45] In essence, Level 3 is seeking to recast the final portion of a long-distance call into an "originating" local call, thereby transforming a single,

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[45] Level 3 clearly expects this windfall, stating in its *Petition* that it is "not seeking forbearance from the interim rules established [in the Commission's *ISP Remand Order*] with respect to intercarrier compensation for dial-up ISP-bound traffic," and that "all ILEC-terminated Voice-embedded IP traffic would be 'originating' traffic for the purposes of applying the '3:1 ratio of terminating to originating traffic' that presumptively delineates ISP-bound traffic from other traffic." *Petition* at 9-10.

interstate call into two separate calls – one interstate and one local. But, the fact that a CLEC might intercept and reroute a long-distance call to the LEC serving the called party does not alter the nature of the call itself: it is one call that originates from the calling party and terminates at the called party.

By recharacterizing the final portion of a terminating long-distance call as if it were an originating local call, Level 3 proposes to increase the number of its originating local minutes that are used to calculate the 3:1 ratio under the *ISP Remand Order*. Because the Commission presumes that any traffic below the 3:1 ratio of terminating to originating traffic is local traffic subject to reciprocal compensation while traffic that exceeds the 3:1 ratio is ISP bound and subject to a lower compensation rate, Level 3's sleight of hand will result in an increase in the reciprocal compensation payments that the terminating LEC owes to Level 3, even though nothing about the nature of this traffic has changed.[46] This is pure arbitrage and confirms that the Commission should not grant Level 3's Petition.[47]

Granting Level 3's *Petition* would, therefore, represent a complete subversion of the Commission's access charge regime. Such regulatory arbitrage is not in the public interest, and the Commission should not permit it.

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[46] *ISP Remand Order,* 16 FCC Rcd 9151, ¶ 79.

[47] The Commission has acted in the past to eliminate regulatory arbitrage opportunities with respect to access charges. *See* Seventh Report and Order and Further Notice of Proposed Rulemaking, *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923, 9925 ¶ 3 (2001) ("Our goal in this process is ultimately to eliminate regulatory arbitrage opportunities that previously have existed with respect to tariffed CLEC access services."). *See also* Declaratory Ruling, *Petitions Of Sprint PCS And AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13,192, ¶ 20 (2002) ("Our goal in the Intercarrier Compensation proceeding is to move toward a unified compensation regime that eliminates the opportunity for arbitrage due to different regulatory treatment of different types of traffic."). It should do so again here.

III. CONCLUSION

For the foregoing reasons, the Verizon telephone companies respectfully request that the Commission deny Level 3's *Petition*.

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March 1, 2004

ATTACHMENT

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.